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Issue Date: 18 January 2005

CASE NOS.: 2003-LHC-2109, 2003-LHC-2125 and 2004-LHC-1655

OWCP NOS: 02-124684, 02-126218 and 02-134664

IN THE MATTER OF

DANIEL L. OBERTS,
Claimant

v.

MCDONNEL DOUGLAS SERVICES/BOEING and
ALSALAM AIRCRAFT CO., LTD.,
Employers

and

AIG CLAIMS SERVICES and
INSURANCE COMPANY OF

APPEARANCES:

Scott C. Sands, Esq.
On behalf of Claimant

Matthew H. Ammerman, Esq.
On behalf of Employer McDonnell Douglas/AIG

Richard L. Garelick
On behalf of Employer Alsalam/Insurance Co. of PA

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding involves consolidated claims for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act" or "LHWCA"), as extended by the Defense Base Act, 42 U.S.C. §1651, et seq. The claims are brought by Daniel L. Oberts, "Claimant," against McDonnell Douglas Services/Boeing ("MDS"), employer which employed Claimant from 1996 through January 12, 1998, and its carrier, AIG Claims Services, and against Alsalam Aircraft Co., Ltd. ("Alsalam"), employer which employed Claimant from January 13, 1998 through May 23, 2001, and its carrier, Insurance Company of the State of Pennsylvania.

Claimant sustained a cervical spine injury during his employment with MDS on October 28, 1997. Claimant seeks temporary total disability benefits for his cervical spine injury, revision cervical spine surgery and past medical expenses from MDS. In the alternative, Claimant seeks such benefits from Alsalam for aggravation of his cervical spine injury. MDS and Alsalam dispute "last responsible employer" status. Claimant was previously awarded compensation for a right shoulder disability sustained during his employment with Alsalam. Judge Roketenetz, in case no. 2001-LHC-2252, found Claimant to suffer total disability from the shoulder injury for the closed period of May 10, 2001 through July 2, 2001, on which date Claimant began receiving compensation from MDS for his neck disability.[1] Claimant now argues entitlement to permanent total disability benefits for his right shoulder injury from July 3, 2001 forward. A hearing was held on May 13, 2004 in St. Louis, Missouri, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument.

EVIDENDCE

The following exhibits were received into evidence:

1) Joint Exhibits ("JX") Nos. 1-2; and

2) Claimant's Exhibits ("CX(i)") Nos. 1-75 and ("CX(ii)")Nos. 1-53;[2] and

3) MDS's Exhibits ("MX") Nos. 1 -68; and

4) Alsalam's Exhibits ("AX") Nos. 1-12.

[1] CX(ii)-47.

[2] Claimant's exhibits submitted into evidence for case no. 2003-LHC-2109 are cited as "CX(i)," and exhibits submitted into evidence for case no. 2003-LHC-2125 are cited as "CX(ii)."

Upon conclusion of the hearing, the record remained open for the submission of post-hearing briefs, which were timely received by both parties. This decision is being rendered after giving full consideration to the entire record.

STIPULATIONS

The Court finds sufficient evidence to support the following stipulations between Claimant and MDS in reference to case no. 2003-LHC-2109: [3]

1) Jurisdiction is not a contested issue. At the time of the alleged injury, Claimant was covered by the Defense Base Act as a result of his employment contract in Saudi Arabia.

2) The date of Claimant's injury was October 28, 1997.

3) Claimant's injury was in the course and scope of employment.

4) An employer/employee relationship existed at the time of the accident.

5) MDS was advised of injury on October 28, 1997.

6) MDS filed a Notice of Controversion on October 24, 2000.

7) An Informal Conference with MDS was held on April 22, 2003.

8) MDS paid compensation benefits to Claimant from October 27, 1998 to November 3, 1998, and paid compensation benefits subject to its Controversion and reserving all defenses, from July 3, 2001 to May 4, 2004, a total of 147 weeks, at varying rates for a total of $57,399.42.

9) MDS paid for Claimant's neck surgery on July 3, 2001, subject to its Controversion and reserving all defenses, including last responsible employer.

The Court finds sufficient evidence to support the following stipulations between Claimant and Alsalam in reference to case no. 2003-LHC-2125:[4]

1) Jurisdiction is not a contested issue. At the time of the alleged injury, Claimant was covered by the Defense Base Act as a result of his employment contract in Saudi Arabia.

[3] JX-1.
[4] JX-2.

2) The date of Claimant's shoulder injury was May 18, 1999.

3) Claimant's injury was in the course and scope of employment, as determined by Administrative Law Judge Roketenetz in his Decision and Order issued November 5, 2002.

4) An employer/employee relationship existed at the time of the injury.

5) Alsalam was advised of injury on May 18, 1999.

6) Alsalam filed a Notice of Controversion on May 13, 2003.

7) An Informal Conference with Alsalam was held on April 22, 2003.

8) Claimant's average weekly wage with Alsalam at the time of the shoulder injury was $1,195.46, as determined by Administrative Law Judge Roketenetz in his Decision and Order issued November 5, 2002.

9) Alsalam paid Claimant temporary total disability compensation benefits at the rate of $796.97 per week for the period from February 8, 2001 through May 9, 2001, and permanent total disability compensation benefits at the rate of $796.97 per week for the period from May 10, 2001 through July 2, 2001, for a total amount of $16,508.57.

10) Alsalam has paid medical benefits.

11) The date of maximum medical improvement for the shoulder injury is May 10, 2001, as determined by Judge Roketenetz in his Decision and Order issued November 5, 2002.

ISSUES

The unresolved issues in these proceedings are:

(1) Responsible Employer for cervical spine injury;

(2) Causation of cervical spine injury;

(3) Nature and Extent of Disability;

(a) Claimant's disability attributable to right shoulder injury from July 3, 2001 forward;

(b) Claimant's disability attributable to cervical spine injury;

(4) Claimant's Average Weekly Wage at MDS;

(5) Section 7 Medical Expenses;

(a) Claimant's entitlement to second neck surgery and alleged unpaid bills from MDS;

(b) Alsalam's responsibility for medical expenses relative to Claimant's neck injury;

(6) Employer's entitlement to Section 8(f) Relief;

(7) MDS's credit for other LHWCA payments;

(8) Statutory Maximum under Sections 906 or 908;

(9) Additional Compensation or Interest under Section 14; and

(10) Entitlement to Attorney's Fees and Other Applicable Assessments.

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Daniel Oberts

Background

Claimant, Daniel Oberts, is forty-three years old and was an employee of McDonnell Douglas Services ("MDS") at the time of his initial injury. He began working for MDS in 1996 and arrived in Saudi Arabia on July 6, 1997 to serve as a crew chief in aircraft maintenance. MDS was worked under a United States Department of Defense Contract with Saudi Arabia, called the Peace Sun Program. TR 52, 57-60.

Daniel Oberts, sustained injury on October 28, 1997 as a result of a bus accident occurring at the MDS air base facility in Saudi Arabia. Mr. Oberts testified that he was a passenger on a bus, operated by an MDS employee, when the bus ran two stop signs and collided with an MDS expediter truck at forty miles per hour. The bus spun 180 degrees and hit a vehicle on the side of the road. Mr. Oberts testified that he was unrestrained and his chest impacted the seat in front of him. He believed that he lost consciousness. When he awoke, he assisted other passengers before his back spasmed from his skull to

lower back. He was transported to the hospital, x-rays were taken, and he was released from the hospital that same day. He visited Dr. Gabel, the company doctor, the following morning. TR 71-78.

Medical History

Mr. Oberts testified that after the accident, he returned to his regular position in a light duty capacity for three days. Over the course of several months, he had frequent follow-up visits with Dr. Gabel and physician's assistant, Niall McGinnis. He testified that he underwent therapy and took muscle relaxers, pain killers, and anti-inflammatories. He suffered from headaches, spasms, pain through his arms and numbness into the fourth and fifth fingers of his left hand. TR 79-81; EX1-47.

Mr. Oberts was working in full capacity on January 13, 1998, when MDS was purchased by Alsalam Aircraft. Mr. Oberts became an Alsalam employee and his job duties remained the same. Mr. Oberts continued to receive treatment at the Peace Sun Clinic, and Dr. Hargis became his treating physician in early 1998. Initially, Dr. Hargis ordered an MRI, which showed herniated discs at C5-6 and C6-7. Dr. Hargis then referred Mr. Oberts to Dr. Khoury, who concurred with the diagnosis. Mr. Oberts testified that his symptoms were increasing at this point in time. Dr. Hargis then referred Mr. Oberts to the United States for further help. Mr. Oberts testified that he saw Dr. Hoffman, a neurosurgeon in Saint Louis, Missouri. Dr. Hoffman also found herniated discs. However, Mr. Oberts testified that he soon returned to Saudi Arabia without further treatment under threat of losing his job. TR 82-86, 166.

Mr. Oberts testified that upon his return to Alsalam, he resumed normal duties. He continued physical therapy and treatment with muscle relaxers. He stated that at this point in time, Alsalam had acquired more aircrafts, and work had increased. He testified that his duties as crew chief included changing tires, fueling aircraft, changing brakes, washing and lubricating the aircraft, and performing pre- and post-flight inspections. The tires were 135 pounds and changed frequently; the brakes were 75 pounds and changed less frequently. He explained that due to his disability, the supervisor would usually delegate the lighter work to him. He testified that he sometimes missed work if he had strained himself the previous day. He testified, for instance, that if he washed an airplane, he would always miss the next day of work. He testified that overhead work, such as performing a lube, gave him the most trouble because of pain in his neck. He testified that he was required to climb fifteen to eighteen foot intake tubes when performing the daily pre-crew or post-flight inspections. He occasionally drove a Coleman, which had a rough ride that would aggravate his neck and back. Mr. Oberts testified that the more work he did, the more he aggravated his neck and back condition. TR 67-69; 87-89, 165, 168, 170-175.

On May 18, 1999, he injured his shoulder while installing a tank in an aircraft. He was pumping 3,000 pounds hydraulic pressure when he felt a tear in his right shoulder. He testified that he saw Dr. Hargis, Dr. Tamal, and Dr. Khoury in Saudi Arabia. He eventually saw Dr. Rogalsky, an orthopedic surgeon in Alton, Missouri, who recommended surgery. He returned to Saudi Arabia in mid-July 1999 and was immediately scheduled for surgery. The surgery was performed by Dr. Khoury on August 17, 1999. He was released to work on light duty three weeks after the surgery. He testified that the physical therapy for his shoulder bothered his neck and he was placed in sedentary duty at a gas station. In March of 2000, Dr. Hargis and Khoury released him to return to his regular employment as crew chief. He testified that he still experienced pain and physical limitations. He explained that when he encountered a task he could not do, he would work around it. He described one occasion where he was running with a hose and it jerked short, snapping his head down. He stated that he lost consciousness, hurt his neck and aggravated his back injury. He admitted that he sometimes asked another worker to drive him home because his neck and back were spasming from the work he had done. TR 89-99, 176-178.

Mr. Oberts testified that his neck pain continually worsened. In April 2000, Dr. Khoury did another MRI and opined that Mr. Oberts needed neck surgery. In response, Alsalam put Mr. Oberts on light duty work in crew debriefing. However, in July 2000, Mr. Oberts was still experiencing numbness in his fingers, headaches, and spasms. In August 2000, Dr. Hargis determined that his condition required he be seen by a neurosurgeon in the United States. Mr. Oberts testified that Dr. Heutel, Medical Director of MDS in St. Louis, disregarded Dr. Hargis' recommendation twice. Mr. Oberts testified that he also spoke with Alsalam managers, who denied him authorization. He received a medevac order only when he requested his vacation and an exit visa for medical attention. He arrived in the United States on August 18, 2000. TR 99-102.

In the United States, Mr. Oberts initially saw Dr. Hoffman for his neck injury, Dr. Rogalsky for his shoulder injury and Dr. Stabell for pain management. He testified that Dr. Stabell was his family doctor and he sought her to care for the recommended pain control. He testified that both Dr. Stabell and Dr. Rogalsky independently recommended Dr. Gornet after looking at the most recent MRI done by Dr. Hoffman. He was seen by Dr. Gornet, who recommended neck surgery. Dr. Rogalsky performed a second right shoulder surgery on January 30, 2001. TR 102-107.

Mr. Oberts remained in the United States. He testified that on February 7, 2001, Alsalam ceased making his salary payments, and he was terminated from employment on May 23, 2001 because he had not returned to work in Saudi Arabia. Dr. Gornet performed neck surgery on July 3, 2001. Mr. Oberts testified that he felt a definite pressure relief after the surgery, but he continued to experience neck pain and numbness in his left fingers. His neck continued to spasm during physical therapy. Dr. Stabell continued to manage his pain medications. Mr. Oberts testified that approximately six

months after his surgery, he reached a plateau in which no further improvement occurred. TR 107-113.

Mr. Oberts testified that in the summer of 2003 his neck pain was increasing, and he was still experiencing headaches and finger numbness. He went back to Dr. Gornet in July 2003 and scheduled an MRI. On September 29, 2003, Dr. Gornet opined that the neck fusion had failed. He recommended a revision surgery and restricted Mr. Oberts from all work. MDS denied authorization for the surgery. Mr. Oberts testified that Dr. Stabell prescribed physical therapy and a TENS unit, a nerve stimulator that calms muscle spasms. He testified that Dr. Stabell currently prescribes 800mg Skelaxin (muscle relaxer) three times per day, 400 mg Darvocet per day, 50 mg Amitriptyline per day, 50 mg Mobic per day, and Prilosec (to tolerate Mobic). TR 126-131.

Vocational Search

Mr. Oberts testified that in 2002 he registered with the Illinois Department of Economic Security and visited the Illinois Department of Occupational Rehabilitation Services ("DORS"). Susan Peters was assigned to be his case worker at DORS. They developed a vocational plan where he would receive training from the Career Alternative Learning Center ("CALC") to become a network control operator. The program required obtaining three certificates. On January 15, 2003, he began the program, attending class three hours a day, five days a week. Class consisted of fifty minute lessons he would do on a computer monitor with headphones. He testified that he occasionally missed class days due to his neck pain. TR 113-119.

In the spring of 2003, Mr. Oberts' attended a job fair. He testified that he passed out all of the resumes he brought with him, but did not receive any interviews or offers. Mr. Oberts testified that he also sought employment with a computer store owned by an acquaintance. However, the job required lifting more than ten pounds, which exceeded his work restrictions. TR 120-122.

In August 2003, Mr. Oberts was informed that he had received an internship as a bench technician with Datajacks; however, it required the ability to lift thirty pounds from bench to bench. He sought a release from Dr. Stabell, but she maintained his ten pound lifting restriction. Mr. Oberts testified that as of September 2003, he continued to go to class, but rarely completed the three-hour time period. As of December 2003, he could only sit in class for two hours, and then had to recover in bed for three hours. December 10, 2003 was the last date he attended class. TR 122-128.

Mr. Oberts testified that he did not look for employment between September 10, 2003 and April 30, 2004. He received a labor market survey on April 30, 2004, fourteen days before the hearing. Mr. Oberts testified that he contacted the companies on the list. He noted that he had an appointment for an interview with Newspaper Telemarketing

Office/Piza Group the day after the hearing. He submitted an application to the applicant pool at Guardsmark Security which was awaiting a contract award. He left resumes with Amerifile and Bio-Merieux Vitek. He contacted the other job listings and determined that each was either not open or outside of his physical limitations. He did not receive any offers of employment. He testified that he did not contact Pride Personnel because it was a personnel placement agency instead of a specific job. TR 133-145, 189, 196.

Prior Injuries

Mr. Oberts testified that he underwent a thorough pre-employment physical before being cleared to go to Saudi Arabia. He testified that he sustained a head injury in a motor vehicle accident in 1993, but that his neck was uninjured. He was kept in the hospital for two days and did not receive any follow-up care with respect to his neck. He also testified that he was in a race car accident in August 1994, where he was fully restrained and wearing a helmet when the side of the car impacted a wall of tires. He was taken to the hospital for x-rays and released the same day. He testified that he did not have any problems with his neck after the accident. TR 62-66.

Wages and Compensation

In October 1996, Mr. Oberts was a manufacturing engineer at MDS, receiving a wage of $1,240 per week, or $31 per hour. When his position was eliminated, he was offered a crew chief position in Saudi Arabia. On April 5, 1997, he began required training for the position and was compensated at a rate of $565 per week. He was compensated at this rate until he arrived in Saudi Arabia on July 6, 1997. TR 57-59.

He testified that his written contract with MDS included a salary, cost of living allowance, and a foreign service additive. He also qualified for incentive leave of $6,300 after a six month period and home leave of $16,752 after a twelve month period; he was to receive the payment regardless of whether he traveled or not. The incentive leave was based on dependents that were in Saudi Arabia with him, and the home leave was based on the cost of airline fare. The contract included a provision that at the conclusion of two years, he was to receive a Saudi service award of $8,000 and the subsequent year he would receive $7,000. He testified that when his employer changed from MDS to Alsalam in January 1998, he received pro-rated compensation for the incentive leave, home leave and service award. TR 69-71, 152.

Mr. Oberts testified that MDS/Boeing paid him compensation of $450 per week until April 22, 2003, at which point his payments were reduced to $109.69 per week. He testified that Alsalam paid the award entered by Judge Roketenetz, but they have not paid the accrued interest. After Judge Roketenetz's order, he received compensation for February 7, 2001 through July 2, 2001 at a rate of $796 per week. TR 146.

II. MEDICAL EVIDENCE: Reports and Depositions

Niall McGinnis, P.A.

Mr. McGinnis is the physician's assistant who initially treated Mr. Oberts at the Peace Sun Clinic in Saudi Arabia after the October 28, 1997 bus accident. He worked under Dr. Gabel, the supervising physician at Peace Sun Clinic. Mr. McGinnis testified that his intake report recorded patient complaints of right shoulder area pain, back pain, right knee pain, and a feeling of fogginess in his head. He recorded that the patient's history reflected no loss of consciousness. He took x-rays, which did not show any evidence of fractures or internal injuries to the C-spine of the neck, the right knee or the right shoulder. Mr. McGinnis testified that Mr. Oberts evidenced tenderness along his spine and in his right shoulder. He testified that Mr. Oberts did not exhibit any paresthesias or weakness in his upper extremities. Mr. McGinnis's impression was minor paracervical neck strain on the right side and minor right knee contusion. He recommended that Mr. Oberts return to work at light duty and prescribed an anti-inflammatory. Mr. Oberts was discharged from treatment for the injury on November 1, 1997. MX-26, p. 5-24; MX-30, p. 24.

On November 16, 1997, Mr. Oberts complained that he experienced a sudden neck and shoulder pain upon lifting his head while lying on his back working. Mr. McGinnis recorded that Mr. Oberts had experienced a possible residual spasm from the bus accident injury and advised him to avoid such work activities. He noted there was no upper extremity weakness. On December 7, 1997, Mr. Oberts was diagnosed with prolonged C-spine muscle pain, post-motor vehicle accident. On January 20, 1998, he exhibited limited left lateral neck flexion. In December and January, Mr. McGinnis noted that Mr. Oberts' neck pain was somewhat diminished, but noticeably present, with no upper extremity symptoms. On February 9, 1998, Dr. Gabel recorded neck spasms and recommended physical therapy. MX-26, p. 25-40; MX-30, p. 24.

Derek W. Hargis, M.D.

Dr. Hargis began treating Mr. Oberts at the Peace Sun Clinic on April 8, 1998. He noted stiff neck, decreased neck mobility, grinding in the neck and muscle spasms. CX(i)-24. In June 1998, Dr. Hargis reinitiated physical therapy for Mr. Oberts. CX(i)-25. On September 7, 1998, Dr. Hargis noted persistent tingling and pain in the neck and upper back and spasms and paraesthesias into the arms. CX(i)-28. An MRI was performed September 8, 1998, which found disc herniation at C6-7, predominantly on the left side. Dr. Hargis found these results consistent with Mr. Oberts' complaints of paraesthesias and pain down his arms. CX(i)-30. Dr. Hargis referred Mr. Oberts to Dr. Khoury to determine if he was a candidate for surgery. CX(i)-31. After Dr. Khoury's conclusion that more studies were necessary to determine whether Mr. Oberts was a surgery candidate, Dr. Hargis referred Mr. Oberts to the United States for further

evaluation and treatment. Mr. Oberts was evaluated in the United States, but did not receive any treatment. CX(i)-34.

Dr. Hargis continued to see Mr. Oberts upon his return to Saudi Arabia. Dr. Hargis consistently noted that Mr. Oberts suffered from continued intermittent back and cervical muscle spasms and bilateral hand paresthesias. He prescribed physiotherapy and muscle relaxers. CX(i)-36-48. An MRI of the cervical spine was done in Saudi Arabia on April 5, 2000, which showed no significant change from the 1998 MRI. CX(i)-49. On July 27, 2000, Dr. Hargis wrote a letter to Dr. Lee Heutel, Medical Director of MDS, stating that Mr. Oberts was not making any further improvement and was no longer able to continue his work load as crew chief. He requested that Mr. Oberts undergo a complete evaluation to determine if he was a candidate for surgery. CX(i)-50.

Dr. Ghassan Khoury, M.D.

Dr. Khoury is an orthopedic surgeon at Consulting Clinics in Riyadh, Saudi Arabia who was consulted on September 28, 1998 regarding Mr. Oberts' candidacy for neck surgery. After visiting with Mr. Oberts and reviewing his medical records, Dr. Khoury found that while Mr. Oberts exhibited genuine neck pathology, his clinical findings did not correlate with the MRI results. He found that Mr. Oberts had a generalized depression of all reflexes in both upper extremities. He also found decreased sensation to light touch of the ring and fifth fingers on the left side. He recommended a repeat MRI on a machine with better resolution and nerve conduction studies of both upper extremities. CX(i)-32.

In deposition, Dr. Khoury opined that the disc abnormalities present in the MRI could be aggravated to cause symptoms such as muscle spasm or neck pain by work that involved extreme range of motion or extreme positions. He also opined that it was likely that the symptoms Mr. Oberts experienced were caused by an aggravation of his underlying neck condition. Dr. Khoury testified that Mr. Oberts' development of upper extremity symptoms a few months after the original injury is indicative of a progression of an impingement or effacement of the disc on the spinal cord. He agreed that such an impingement, and the resulting upper extremity symptoms, could be caused by extreme neck flexion and extension and by axial loadings associated with significant work activity. Dr. Khoury opined that repeat exacerbation brought on by Mr. Oberts' workload over the course of two years would have progressed his soft tissue injury. He testified that the incident described by Mr. Oberts when he was running with a hose and it jerked, snapping his head, is the type of incident that would aggravate his underlying neck pathology. MX -29, p. 5-8.

The last time that Dr. Khoury saw Mr. Oberts was on January 25, 2000, one year prior to his neck surgery. At the deposition, Dr. Khoury was unaware that Mr. Oberts underwent neck surgery in January 2001. He opined that Mr. Oberts' C5-6 pathology

was a result of chronic degenerative changes while the C6-7 pathology was a soft disc herniation that may have developed as a result of an accident. Dr. Khoury testified that an MRI or nerve conduction study which showed changes in the nerves that correspond to the C6-7 level of compression would indicate a need for surgery. MX-29, p. 8, 11.

In April 2000, Dr. Khoury received the most recent MRI report that reflected cervical pathology at C6-7, C4-5, and C5-6. He maintained that the MRI findings did not correlate with the clinical findings of pain and tingling in the right upper extremity. He recommended physiotherapy. CX(i)-46.

William Hoffman, M.D.

Dr. Hoffman is a neurosurgeon who first saw Mr. Oberts on October 29, 1998 when he was referred for treatment in the United States. His impression was that Mr. Oberts suffered from neck pain, arm pain, and hand paresthesias in the fourth and fifth fingers. He initially reviewed the MRI that was taken in Saudi Arabia and found that the picture lacked clear resolution. Dr. Hoffman found the scan insufficient to warrant surgery and ordered a myelogram and CT scan. He testified that the CT scan showed a defects at C5-6 and C6-7. There was no impingement of the nerve roots. Dr. Hoffman maintained that Mr. Oberts was not a surgical candidate because there was a lack of correlation between the symptoms and CT results. He next ordered a nerve conduction study and an EMG; however, those results did not establish the requisite correlation either. MX-24, p. 5-12; CX(i)-35.

Mr. Oberts returned to Dr. Hoffman on August 21, 2000. Dr. Hoffman testified that Mr. Oberts' subjective complaints had worsened. He complained that his neck pain rendered him unable to function, and he described pain down his bilateral arms into his hands and fingers. Dr. Hoffman ordered an MRI scan and found that the diagnosis had improved. He again opined that Mr. Oberts' symptoms did not correlate with the findings, and he was not a surgical candidate. He advised Mr. Oberts that he could seek help from a rheumatologist to receive anti-inflammatories and arthritic aid. He opined that Mr. Oberts was a chronic pain patient. MX-24, p. 15-24.

Dr. Hoffman testified that he did not believe that the activities of a crew chief would have significantly increased Mr. Oberts' structural problems. He also testified that it is not likely that Mr. Oberts' engagement in pain-producing activity would prevent a full recovery from his cervical spine injury. MX-24, p. 12-15.

Dr. Hoffman testified that a C-7 abnormality affects the triceps and the first and second fingers. He disagreed with Dr. Khoury's opinion that the numbness in Mr. Oberts' left upper extremity could be explained by the C6-7 disc herniation with slight pressure on the C-7 nerve root. MX-24, p. 36-37.

Dr. Hoffman testified that he disagreed with the diagnosis of the October 29, 1998 cervical myelogram and post-myelogram cervical CT scan. The radiologist found largely abnormal discs at C5-6 and C6-7. Dr. Hoffman thought that the defects at C5-6 and C6-7 were not large. Analyzing the report, he explained that the C5-6 disc did not touch the spinal cord, so it could not produce bilateral radicular upper extremity syndrome, but could cause neck pain. He explained that the C6-7 disc protruding on the left could produce radicular upper extremity symptoms on the left side. Dr. Hoffman noted on November 2, 1998 that Mr. Oberts' sensitivity of the ulnar nerve at the elbow could explain his fourth and fifth finger paresthesias. He testified that the bilateral arm pain involving the entire arms, weakness in his upper extremities and dizziness could not be accounted for. However, as of November 1998, he had seen objective findings that would explain a certain degree of neck pain. MX-24, p. 41-51.

Matthew Gornet, M.D.

Dr. Gornet is a spine surgeon who first saw Mr. Oberts on October 19, 2000 in the United States. His initial impression was that Mr. Oberts was experiencing upper extremity pain and numbness as a result of his C5-6 and C6-7 disc herniations. He noted that extension significantly exacerbated the neck pain. Dr. Gornet explained that when Mr. Oberts engaged in neck extension, the range of motion caused irritation to the herniated areas of the spine, which in turn increased his symptoms. Dr. Gornet clarified that the irritation was a purely mechanical phenomenon, where the nerve fibers within the disc refer mechanical pain to the neck. CX(i)-70, p. 4-12.

Dr. Gornet explained that physical activity and mechanical irritation cause inflammation; the inflammation in turn produces worsened symptoms. He stated, "It doesn't necessarily cause a new problem, but it does continue to create a scenario of inflammation, which may make a particular individual's symptoms worse." He strongly disagreed with the statement that physical activity could move along the progression of the cervical disease. Dr. Gornet stated that vigorous physical activity, including the activities undertaken by Mr. Oberts as crew chief, would not have increased the progression of his cervical disease. However, he testified that the vigorous activity clearly aggravated his symptoms. He again clarified that "aggravation of one's symptoms doesn't mean changing of the anatomical problem." Dr. Gornet testified that when he compares the 1998 MRIs and those immediately preceding the 2001 surgery, there is not a significant structural difference. CX(i)-70, p. 16-24.

Dr. Gornet performed a two-level fusion on Mr. Oberts on July 3, 2001. After the surgery, Mr. Oberts reported that his neck felt better but he experienced intermittent sharp pain to his left neck and shoulder. In October 2001, Dr. Gornet referred Mr. Oberts to physical therapy. On January 14, 2002, Dr. Gornet opined that Mr. Oberts was at maximum medical improvement, stating that he believed Mr. Oberts would always have some level of pain. He restricted Mr. Oberts to sedentary work. CX(i)-70, p. 52-56.

On August 29, 2003, a CT scan was performed, and it demonstrated a failed fusion in the cervical spine at both C5-6 and C6-7. Dr. Gornet recommended a revision cervical fusion. Dr. Gornet testified that, given the CT scan results, Mr. Oberts was not at MMI on January 14, 2002. In follow-up, Dr. Gornet saw Mr. Oberts on November 14, 2002 and July 17, 2003. He testified that Mr. Oberts had continued chronic pain in his shoulders, neck, and low back. Dr. Gornet testified that the likely cost of revision surgery would be $50,000, plus the cost of formal rehabilitation, and follow-up CT scans. Dr. Gornet testified that the revision surgery is medically necessary due to Mr. Oberts' injuries from the bus accident, because it is causally connected to the original surgery. His opinion is that the disc herniations at both C5-6 and C6-7 were a result of the bus accident. CX(i)-70, p. 73-82.

Dr. Gornet testified that Mr. Oberts is currently not at MMI due to the failed fusion in his cervical spine. Dr. Gornet testified that Mr. Oberts' ongoing complaints of neck pain since the July 2001 surgery were consistent with the results of the CT scan. On September 29, 2003, Dr. Gornet restricted Mr. Oberts from all work until further notice. Dr. Gornet testified that Mr. Oberts wants the surgery, but currently he has not undergone surgery. CX(i)-70, p. 83-85.

Randall Rogalsky, M.D.

Dr. Rogalsky is a board certified orthopedic surgeon practicing in Alton, Illinois. He was Mr. Oberts' treating physician in the United States for his right shoulder injury of 1999. Dr. Rogalsky did not perform Mr. Oberts' original arthroscopic shoulder surgery, but performed a second shoulder surgery on January 30, 2001. He testified that he coordinated with Dr. Gornet so that he could perform the shoulder surgery before Dr. Gornet performed neck surgery. MX-16, p. 7-9, 12, 16-17.

Dr. Rogalsky opined in a letter written May 9, 2001 that Mr. Oberts could theoretically return to work from the perspective of his shoulder, but that his neck would keep him from gainful employment in the short term. He testified that he did not write work restrictions because Mr. Oberts was still completely disabled due to his neck. MX-16, p. 30-32.

Kristen Stabell, M.D.

Dr. Stabell is a board-certified internal medicine and geriatrics physician. She has been Mr. Oberts' primary care physician since 1993. After the bus accident, she saw Mr. Oberts on both occasions that he returned to the United States. She testified that when she saw him on September 1, 2000, he complained of neck and low back pain. His head and neck exam were normal, except he had a fifty percent diminished range of motion on the right muscle of his neck. There was no sensory impairment in his arms. She

prescribed pain management medications and suggested that he see Dr. Gornet. Dr. Stabell next saw Mr. Oberts monthly through March 2001, during which time she recalls that he had very little relief from pain. CX(i)-69, p. 5-19.

Dr. Stabell testified that she cleared Mr. Oberts to proceed with both shoulder surgery and spine surgery. She testified that Mr. Oberts had a ten pound lifting restriction attributable to his right shoulder. Dr. Stabell saw Mr. Oberts approximately ten weeks after his neck surgery, on September 17, 2001. His range of motion was limited, and he had tenderness at C-7, T-12, and L-5. She next saw Mr. Oberts on November 16, 2001. He complained of continued neck and midthoracic back pain. He was unable to perform any physical activity and was not progressing in physical therapy. She opined that he had reached the maximum recovery benefits expected from cervical spine fusion surgery and recommended that he avoid physical labor and train for a sedentary job. CX(i)-69, p. 20, 27-30; MX-23, p. 90.

Mr. Oberts returned to Dr. Stabell on February 15, 2002. She determined that he had chronic neck and arm pain and maintained that he should avoid physical labor. She referred him back to Dr. Gornet again for follow-up care. Dr. Gornet then determined that the cervical fusion had failed. CX(i)-69, p. 30-33.

When Dr. Stabell saw Mr. Oberts on May 19, 2003, he reported that he was in pain much of the day, and that he did not take his pain medicine before he went to computer training class because it made him drowsy. She found muscle spasms in his paraspinous muscles in the low cervical, upper thoracic, and upper lumbar areas. She determined that he had persistent disc disease in his neck. The anti-inflammatories had failed and the muscle relaxants made him too tired. She saw him again on July 21, 2003. He reported that he had difficulty sitting for more than three hours in class and that he had spasms in his arms and legs that would wake him up at night. His reflexes were absent in both arms. She prescribed a hard cervical collar for extended periods of sitting. On August 11, 2003, Mr. Oberts wanted to take a leave of absence from school due to his difficulty focusing his attention because of pain and drowsiness caused by his medications. Dr. Stabell felt that the leave of absence from school was appropriate. CX(i)-69, p. 34-41.

Dr. Stabell refused to approve the internship Mr. Oberts was offered, because its lifting requirement of thirty-five pounds did not meet her restriction of maximum lifting of ten pounds at waist to waist level. She stated that her restrictions could change slightly in the future depending on the results of Dr. Gornet's surgery. CX(i)-69, p. 42-43.

Dr. Stabell saw Mr. Oberts on October 1, 2003. He was experiencing great pain and spasms in his neck. She prescribed physical therapy and a TENS unit, which electrically overstimulates the muscle and reduces spasms. His most current combination of medications was Skelaxin, a muscle relaxant, Mobic, an anti-inflammatory, and Elavil

for pain management, sleep and muscle relaxant. He was also prescribed sixty Darvocets a month to take at his discretion. CX(i)-69, p. 45-48.

Dr. Stabell saw Mr. Oberts on December 1, 2003, January 13, 2004, February 23, 2004 and March 10, 2004. She recorded absent reflexes bilaterally in the arms, which she characterized as an objective finding of ongoing abnormality in the cervical spine. She also noted diminished muscular tone in the triceps and biceps region. MX-23, p. 70-72.

Dr. Stabell opined that Mr. Oberts' cervical spine problems were due to the October 28, 1997 bus accident and that the mechanism of his injury is consistent with sustaining herniated cervical discs. She believes that Mr. Oberts' subjective complaints of pain are genuine, because the complaints have been consistent over time with objective findings, including the absence of reflexes, muscle tension and tenderness, and x-ray evidence of persistent abnormalities. She opined that Mr. Oberts was not employable in any gainful employment at this time. She believed that in the absence of revision surgery, his pain and limitation of function with respect to his cervical spine would be permanent conditions and he would require chronic pain management, physical therapy and pain medications. She opined that Mr. Oberts was not at MMI because an operation to correct the failed fusion would improve his condition. CX(i)-69, p. 49-57; MX-23, p. 72, 82-83.

Dr. Stabell testified that Mr. Oberts' physical condition had worsened between November 6, 1998 and September 1, 2000. She opined that the work he performed as crew chief during this time aggravated his neck injury. However, she was unsure if the work advanced his cervical disease. Dr. Stabell testified that the absence of upper extremity pain and tingling from the date of Mr. Oberts' accident until September 1998 indicates that a new symptom arose in his cervical condition. She was unable to conclude whether the upper extremity complaints were a result of the herniated discs. CX(i)-69, p. 64-65; 85-89.

Dr. Stabell admitted that lifting activities are more likely to aggravate neck arthritis, which could lead to muscle spasms. Swelling in the soft tissues produces inflammation when bone rubs on bone and can be triggered by axial loading or pulling type of activity. MX-23, p. 16-17.

Dr. Stabell recalled that Mr. Oberts had been in a race car accident in 1994 where he had injured his neck, arm, and back. His neck injury was a soft tissue injury with no bone fracture, and he responded well to a short course of medicine and minimal physical therapy. She opined that the 1994 accident played no role in his current neck condition. CX(i)-69, p. 112-113.

Dr. Stabell opined that after surgery Mr. Oberts could work as a network control operator as long as he was not required to lift over ten pounds. However, she ultimately deferred to Dr. Gornet as to permanent work restrictions. She testified that Mr. Oberts' ten pound maximum lifting restriction was assigned to his shoulder injury and should remain unchanged regardless of the neck surgery. She opined that currently Mr. Oberts is unemployable; he has too much spasm and pain to do even sedentary work. MX-23, p. 29, 37-38.

Dr. Stabell opined that Mr. Oberts' current disability is materially and substantially greater than it would have been had he only had the right should injury. His current disability includes his neck injury as well as his shoulder injury. MX-23, p. 69.

Marvin Mishkin, M.D.

Dr. Mishkin is a board certified orthopedic surgeon. He was retained by MDS to do an independent medical examination ("IME") of Mr. Oberts. He examined Mr. Oberts on March 26, 2002 over the course of one to two hours. Dr. Mishkin found hypoactive reflexes in the upper extremities and trace responses in the biceps and triceps. MX-21, p. 5-6, 49-50, 73-74.

Dr. Mishkin reviewed Peace Sun Medical Clinic records from January 1998 through September 1998 and recounted that the records reflected that Mr. Oberts did not complain of upper extremity pain until September 28, 1998. He opined that the arising complaints of pain in the upper extremities indicated a progression of the disease because it indicates irritation of the nerves emanating from the cervical spine. MX-21, p. 12-15.

He compared the CT scan of October 29, 1998 with the MRI scan of October 27, 2000. He testified that the 2000 MRI scan showed soft tissue protrusion on the left side at C5-6, which was not evident to the same extent in the earlier CT scan. He opined that such a change indicates a progression of cervical spine disease that correlates with Mr. Oberts' change in symptomatology. Dr. Mishkin opined that Mr. Oberts' vigorous work activities sped up the progression of his disease and aggravated his underlying cervical condition. MX-21, p. 15-21.

Dr. Mishkin opined that Mr. Oberts was at MMI for any injury associated with the 1997 bus accident. He conceded that Mr. Oberts was not at MMI for the injury treated by surgical fusion, although he thought it debatable because he found no clinical evidence to indicate an objective problem associated with the nonunion. He would not recommend the revision surgery. MX-21, p. 108-109.

Dr. Mishkin reviewed the Vocational Evaluation Report done by Mr. Kaver on August 8, 2002 and approved all jobs under the heading "light level of physical

activities" and under the heading "light level physical activities modified to sedentary." MX-21, p. 22-23.

Dr. Mishkin testified that the cause of Mr. Oberts' current disability is a combination of the right shoulder injury and the neck injury. He agreed that the pre-existing neck condition materially and substantially contributed to his current disability. Dr. Mishkin agreed that he saw no radiographic evidence suggesting that Mr. Oberts had a degenerative condition predating the bus accident in 1997. MX-21, p. 37-38, 78.

Frank O. Petkovich, M.D.

Dr. Petkovich is a board certified orthopedic surgeon. He examined Mr. Oberts on April 11, 2001 at the request of the United States Department of Labor in connection with the 1997 neck injury. His diagnosis was cervical disc herniation at C5-6 and C6-7 and a muscular lumbosacral strain. He determined that Mr. Oberts was in need of cervical surgery. AX-4, p. 6-8.

On May 11, 2001, he examined Mr. Oberts' right shoulder injury at the request of AIG, Alsalam's insurer. On September 17, 2003, he performed another IME at the request of Mr. Garelick, AIG/Alsalam's attorney. He found that Mr. Oberts would most likely need surgery to revise the cervical spine fusion. Dr. Petkovich opined that Mr. Oberts injured his cervical spine as a result of the 1997 bus accident and that Mr. Oberts' spine condition was not related to his shoulder injury. He opined that Mr. Oberts could return to work with respect to his right shoulder with a 45 pound lifting limitation and no repetitive overhead work. With respect to his neck, Mr. Oberts could not lift greater than thirty pounds and could not do repetitive overhead work. Dr. Petkovich defined Mr. Oberts' current ability to work at the medium demand level—occasionally lifting 50 pounds, frequently lifting 20 pounds and constantly lifting 10 pounds. He opined that Mr. Oberts' continuation of work activities may have exacerbated his cervical spine condition, but his need for surgery was caused by the 1997 injury. He testified that the need for a second cervical spine surgery was caused purely be the failure of the first surgery, not by any other factors. AX-4, p. 9-17, 21.

Dr. Petkovich testified that Mr. Oberts' current overall permanent disability is due to a combination of the shoulder injury and the neck injury. He rated 35 percent attributable to the shoulder injury and 65 percent attributable to the neck injury. He opined that Mr. Oberts is capable of returning to work in some capacity. AX-4, p. 18-19.

VOCATIONAL EVIDENCE: Reports

Susan Peters

Ms. Peters is a vocational rehabilitation counselor with the State of Illinois, Department of Human Services, Office of Rehabilitation Services. She testified that Mr. Oberts was referred to her from the Illinois Employment Resource Center in July 2002. She reviewed his medical records and determined his restrictions. She testified that it was Mr. Oberts' choice to enter the CALC training to become a network control operator and that he has been very cooperative. She testified that through the first several months of training Mr. Oberts maintained a very positive attitude, but was absent from class on days where he felt too much pain. She was aware of Mr. Oberts' one week break in August 2003 due to increased pain. She testified that his absences increased and his grades went down after September 2003, when she was informed that his cervical fusion had failed. He stopped attending classes on December 10, 2003, which was mutually agreed upon between herself, Mr. Oberts and CALC. She explained that his file is still open, but it is pending until it is determined if he can complete the program. She was told by Fred Albert of CALC that Mr. Oberts needs another 120 classroom hours to finish his curriculum. TR 209-222, 233-235.

Timothy Kaver

Mr. Kaver is a vocational rehabilitation specialist retained by MDS. He performed a labor market survey on August 8, 2002. He found openings for several A&P mechanic positions at the medium duty level, which he believe to be in accord with Drs. Mishkin and Kove's physical restrictions. At the light duty level, he noted five positions, one of which was an aircraft maintenance instructor position that paid an annual salary of $25,000. Mr. Kaver testified that the Department of Labor's definition of light duty included requirements of lifting up to twenty pounds occasionally. He also found seven sedentary job positions, ranging from a wage of $8.00 to $11.00 per hour. TR 238-244; MX-53.

Mr. Kaver's April 20, 2004 labor market survey, included consideration of Mr. Oberts' A+ certification, Drs. Petkovich and Mishkin's recommendations for medium duty work, and Drs. Kove and Gornet's recommendations of sedentary work. Mr. Kaver listed several A&P mechanic positions at the medium duty level. At the sedentary level he indicated a computer help desk specialist position at Convergy's that required A+ certification. He stated that the job would entail sitting in front of a computer wearing a headset and responding to telephone calls. The employee would be able to alternate between sitting and standing. Mr. Kaver testified that his contact at Convergy's told him they were still recruiting for the help desk personnel positions on May 12, 2004. There was also a similar sedentary job available at Salvation Army. Mr. Kaver testified that that job at Salvation Army that Mr. Oberts referred to as having lifting requirements was

a PC specialist position. Mr. Kaver also indicated a help desk job at Bio-Merieux Vitek, which was still available on May 12, 2004. TR 243-248; MX-54.

On May 6, 2004, Mr. Kaver also compiled an April 1, 2002 historical labor market survey. He listed several sedentary positions, including security monitor, office clerk, documentation clerk, student services clerk, customer service representative, cashier and order taker. The wages ranged from $8.00 to $11.00 per hour. TR 250-252; MX-66.

Roy Katzen

Mr. Katzen is a vocational rehabilitation specialist who was retained by Alsalam. He relied on the restrictions given by Dr. Rogalsky, which he interprets as allowing a ten to twenty pound lifting range. His labor market surveys focused on sedentary security guard and telemarketer jobs. He contacted the companies in April 2004 and also inquired as to job availability in September 2003, the time frame of Dr. Petkovich's last examination of Mr. Oberts. TR 280, 287-290.

Mr. Katzen's telemarketing labor market survey indicated four telemarketing jobs listed in local want ads. Verizon Wireless was in an aggressive hiring mode with sixty job positions to fill. The contact at Verizon also stated that there had been steady openings for the past one to two years. The second job listed is Newspaper Telemarketing Office/Piza Group, with which Mr. Oberts has a scheduled interview. Mr. Katzen noted that this job was also open in September 2003. The third listing was Pride Personnel, an employment agency that did recruiting for a number of telemarketing companies with wages ranging from $7.00 to $12.00 per hour. The contact at Pride Personnel confirmed that there had been steady openings since September 2003. The last listing was Call Center, which had a current opening, but did not confirm an opening September 2003. TR 291-295; AX-7.

Mr. Katzen's labor market survey regarding security jobs indicated six companies that were hiring. He obtained this list by contacting security companies listed in the yellow pages and by researching wanted ads on the internet. Mr. Katzen testified that all of the security positions would require two days of classroom training and passing a written test. He noted that Allied Security, Twin Cities Security, Whelan Security, Securitas, and Guardmark had openings for unarmed security work in early April 2004 and that openings had also been available in September 2003. Global Security was accepting applications for multiple assignments in April 2004. TR 296-303; AX-8.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the

trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

JURISDICTION AND COVERAGE

This dispute is before the Court pursuant to the Longshore Harbor Workers' Compensation Act, as extended by the Defense Base Act. 42 U.S.C. § 1651. The LHWCA applies "in respect to the injury or death of any employee engaged in any employment . . . under a contract entered into with the United States or any executive department, independent establishment, or agency thereof . . . where such contract is to be performed outside the continental United States . . . for the purpose of engaging in public work." 42 U.S.C. § 1651.

In this case, the parties do not contest jurisdiction under the Defense Base Act. At the time of his injury, Claimant was employed by MDS under a United States Department of Defense contract with Saudi Arabia. TR 60. Therefore, the Court finds that jurisdiction proper under the Defense Base Act.

FACT OF INJURY AND CAUSATION

The claimant has the burden of establishing a prima facie case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318 (1982). Once the claimant establishes these two elements of his *prima facie* case, Section 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Hamptom v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990). After the Section 20(a) presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vicchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to

support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

The parties have stipulated that Claimant originally injured his neck in the course and scope of his employment with MDS. JX-1. Based on Mr. Oberts' testimony and medical records, the Court finds that there is sufficient evidence to support this stipulation. CX(i)-30; TR 71-73, 76. Claimant clearly injured his neck as a result of the bus accident on October 28, 1997. At issue is whether the initial injury naturally progressed to cause Claimant's current condition, or was aggravated by Claimant's subsequent work activities with Alsalam.

RESPONSIBLE EMPLOYER

In a situation where two or more LHWCA employers may be responsible for a work-related injury or disease, the last employer is generally held liable for all compensation, even if work performed for the prior employers contributed to the injury. Foundation Constructors, Inc. v. Director, OWCP, 950 F.2d 621, 623 (9th Cir. 1991). This rule serves to avoid the difficulties and delays connected with trying to apportion liability among several employers, and works to apportion liability in a roughly equitable manner, since all employers will be the last employer a proportionate share of the time. Id. The last employer rule is applied differently depending on whether a claimant's disability is characterized as an occupational disease or a two-injury case. Kelaita v. Director, OWCP, 799 F.2d 1308, 1311 (9th Cir. 1986).

For occupational disease cases, the employer during the last employment where the claimant was exposed to injurious stimuli prior to the date on which the claimant was aware or should have been aware of the relationship between his disability, disease and employment is liable for the full amount of the award. Carver v. Ingalls Shipbuilding, Inc., 24 BRBS 243, 246-47 (1991); Travelers Ins. Co. v. Cardillo, 225 F.2d 137, 145 (2nd Cir. 1955). For two-injury, or aggravation, cases, the rule is:

> If the disability resulted from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and accordingly, the prior employer is responsible. If, on the other hand, the subsequent injury aggravated, accelerated or combined with the claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury, and the subsequent employer is responsible.

Kelaita, 77 F.2d at 1311; Foundation Constructors, Inc., 950 F.2d at 624. Given that Mr. Oberts' neck condition was initiated by the isolated trauma of the bus accident, the Court finds that the two-injury/aggravation rule should apply.

To be relieved of liability in a two-injury/aggravation case, the first employer bears the burden of proving, without benefit of further presumption, by a preponderance of the evidence that there was a new injury or aggravation during employment with the second employer. Buchanan v. International Transportation Services, 31 BRBS 81, 85 (1997). The second employer, on the other hand, must prove that Claimant's condition is solely the result of the injury with the first employer in order to escape liability. Id. A determination as to which employer is liable requires the administrative law judge to weigh the evidence as a whole, and to arrive at a conclusion supported by substantial evidence. Id.

After weighing the evidence as a whole, the Court finds that Claimant's disability is solely the result of the natural progression of his original injury at MDS on October 28, 1997. MDS, the first employer, has failed to show that a new injury or aggravation occurred during Claimant's employment with Alsalam, the second employer. Further, Alsalam has successfully shown that Claimant's neck condition is solely the result of his injury sustained during the bus accident at MDS. The Court relies upon the medical expert testimony of Claimant's neurosurgeon, Dr. Gornet, the chronological history of symptoms documented in Claimant's medical records, and Claimant's credible testimony to reach this conclusion.

Claimant's medical records establish that he suffered cervical injury as a result of the October 28, 1997 bus accident. His medical records further document a chronological history of symptoms that reflect a natural worsening of the underlying condition. Immediately after the accident, Claimant was diagnosed with paracervical neck strain and was treated conservatively. MX-26, p. 23. However approximately two weeks later, he experienced sudden neck pain while lifting his head during work activity at MDS. Physician's Assistant McGinnis diagnosed this event as a possible residual neck spasm. MX-30, p. 24. MDS's contention that Claimant was initially improving, as documented in the medical records, is not persuasive in convincing the Court that Claimant's condition was reaching resolution. The records reflect that any initial improvement by Claimant was minimal, and Claimant consistently continued to experience neck-related symptoms after this brief period of mild improvement. Claimant returned to Peace Sun Clinic monthly through April 1998, where McGinnis recorded "prolonged C-spine muscle pain," "limited neck flexion," "neck spasms," and "decreased neck mobility, grinding, and muscle spasms." MX-26, p. 33-39; CX(i)-24. The first MRI was conducted on September 7, 1998 when he came under the care of Dr. Hargis at the Peace Sun Clinic. The MRI showed disc herniations. CX(i)-30. At this same time, Claimant began experiencing upper extremity weakness. CX(i)-28. The following month, Dr. Hoffman performed a CT scan in the United States which also evidenced disc

defects. MX-24, p. 8. This initial sequence of symptoms encompasses the employer status change from MDS to Alsalam on January 13, 1998. Clearly, Claimant's condition had not resolved at the time he began working under Alsalam.

This chronology of symptoms illustrates a consistent worsening of the injury with no apparent event or date where work activity at Alsalam played a role in accelerating the progression. MDS makes much of the fact that Claimant's upper extremity weakness did not begin until he was working under Alsalam. However, the sole fact that Claimant did not experience this symptom until he was an employee of Alsalam does not conclusively establish that it was a result of his Alsalam work activity, rather than the natural progression of the cervical disc injury. While Dr. Khoury testified in his deposition that such a symptom is indicative of a progression of the impingement of a disc onto the spinal cord, he only speculated that the symptom *could have* been caused by significant work activity. MX-29, p. 21. Notably, however, when Dr. Khoury found that Mr. Oberts was experiencing upper extremity weakness on September 28, 1998, he did not recommend any work restrictions. The Court finds Dr. Khoury's testimony in this regard inconclusive in establishing an aggravation or acceleration of the original injury.

The Board has held, "[I]n cases involving multiple traumatic injuries, the responsible employer determination depends on the cause of the claimant's *ultimate disability*; only if the disability is at least partially the result of trauma sustained in employment with a subsequent employer is the subsequent employer liable." Morrison v. Operators and Consulting Services, Inc., BRB No. 03-0541 (2004) (citing Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co. [Price], 339 F.3d 1102, 1105, 37 BRBS 89, 90 (CRT) (9th Cir. 2003). The Board also stated, "[T]he fact that the claimant sustained a temporary exacerbation with a subsequent employer is not determinative of the responsible employer issue." Id. The Court finds, on the basis of Dr. Gornet's testimony, that Claimant's ultimate disability was caused by his injury at MDS and was in no part the result of trauma sustained at Alsalam. Dr. Gornet repeatedly testified that Mr. Oberts' work activities did not progress the cervical disease. AX-12, p. 22-23. He clearly opined at several points in his deposition that the pain Mr. Oberts experienced while performing work activities were temporary mechanical symptoms caused by irritation of the nerve fibers. CX(i)-70, p. 11-12. He strongly stated that physical activity did not progress Mr. Oberts' cervical disease and that the mechanical irritation he experienced did not cause a new problem. CX(i)-70, p. 16-17. The Court places great weight on the testimony of Dr. Gornet, Mr. Oberts' neurosurgeon, who has followed him from October 2000 through the present. Additionally, both Dr. Gornet and Dr. Hargis compared the 1998 MRI and the 2000 MRI, during which interim period Mr. Oberts had been working under Alsalam as a crew chief, and opined that there had been no significant change in Mr. Oberts' neck condition. Based upon the above rationale, the Court finds that Claimant's ultimate disability is attributable solely to the injury sustained as a result of his accident at MDS.

MDS has not proven by a preponderance of the evidence that Claimant suffered a new injury or aggravation during his employment with Alsalam. See Buchanan, 31 BRBS at 85. MDS offers the speculation of three doctors that Claimant's work may have exacerbated his underlying neck condition: Dr. Khoury, Dr. Petkovich, and Dr. Stabell. However, neither Dr. Khoury nor Dr. Petkovich was Claimant's treating physician; Dr. Khoury was a consulted surgeon, and Dr. Petkovich conducted an IME. Further, Dr. Stabell qualified her response with the assertion that Claimant was not under her care while working for Alsalam. CX(i)-69, p. 65. Only Dr. Mishkin, the independent medical examiner obtained by MDS, stated conclusively that Claimant's underlying neck pathology was accelerated by his work at Alsalam. MX-21, p. 15. The Court places little weight on Dr. Mishkin's testimony, as he examined Mr. Oberts in 2002 over the course of only one to two hours. MX-21, p. 49-50. In contrast, Dr. Gornet, who performed the neck surgery and treated Claimant over the course of three to four years, adamantly stated that Claimant's underlying condition did not suffer a new injury or aggravation as a result of work activities. CX(i)-70, p. 16-24. Claimant also offered credible testimony that he "worked around" difficult duties while working for Alsalam. TR 88. Claimant's testimony did not pinpoint a time when his neck condition worsened, and his treating physician at the Peace Sun Clinic, Dr. Hargis, did not record any particular activity or date at which point the disc further worsened. Lastly, even after Claimant ceased working in July 2000, his pain continued to increase. Dr. Stabell's testimony and medical records evidence that Mr. Oberts continued to complain of pain through 2001 before she referred him to Dr. Gornet for surgery. CX(i)-69, p. 19.

In conclusion, the Court finds that Claimant's injuries and resultant surgery are the consequence of his injury on October 28, 1997 alone. They are not the result of any continued employment with Alsalam. Therefore, the Court finds that MDS is the responsible employer liable for all compensation of Claimant's neck injury.

NATURE AND EXTENT OF SCHEDULED DISABILITY

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery

merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5, (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

The Court finds that Mr. Oberts has not reached maximum medical improvement with respect to his cervical spine injury. Dr. Gornet, the neurosurgeon who performed the original fusion, testified that Mr. Oberts was not at MMI because the fusion had failed. CX(i)-70, p. 83. He recommended surgery to correct the fusion and testified that Mr. Oberts has significant painful symptoms that only corrective surgery could rectify. CX(i)-70, p. 78, 87. Further, Mr. Oberts continues to complain of worsening pain and wishes to have the surgery. TR 127. Because Claimant has not yet reached MMI, the Court finds that his disability is temporary in nature.

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97

(1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989). If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

Claimant has not worked in his regular position as crew chief since he returned to the United States on August 18, 2000. TR 102, 146. On July 7, 2000, Dr. Hargis had advised the Medical Director of MDS that Mr. Oberts was no longer able to continue his work load as crew chief. CX(i)-50. After Dr. Gornet performed the fusion surgery and believed Mr. Oberts to be at MMI, he restricted Mr. Oberts to sedentary work. CX(i)-70, p. 56. Clearly, the evidence establishes that Mr. Oberts was unable to return to his regular employment as crew chief both before and after his neck surgery. Therefore, the Court finds that Claimant has established a *prima facie* case of total disability.

MDS submits into evidence three labor market surveys conducted by Mr. Kaver to establish partial disability: an April 1, 2002 historical labor market survey, an August 8, 2002 labor market survey, and an April 20, 2004 labor market survey. The Court finds that only the August 8, 2002 labor market survey demonstrates suitable alternative employment. Dr. Gornet released Mr. Oberts to perform only sedentary work on April 22, 2002. CX(i)-70, p. 56. Therefore, as of April 1, 2002, Mr. Oberts had not been released by his treating physician, Dr. Gornet, to return to work in any capacity, rendering the April 1, 2002 historical labor market survey ineffective in establishing any suitable alternative employment. However, the August 8, 2002 labor market survey establishes SAE because it includes sedentary job positions for which Mr. Oberts had been released at that time.[5] Mr. Kaver found seven sedentary job positions with wages ranging from $8.00 to $11.00 per hour. MX-53.

The Court finds, however, that Claimant has proven a diligent search and a willingness to work during this period of time, which rebuts Employer's showing of suitable alternative employment. In deposition, Claimant explained the notes he made on approximately August 20, 2002 to contact the positions listed on the labor market survey. MX-19, p. 153-154. Claimant contacted each the companies of each of the seven sedentary positions listed. He sent resumes to two companies, two of the positions had been filled, and he attempted to contact three of the companies several times with no response. MX-19, p. 155-168. Beyond contacting the positions listed on the labor market survey, Mr. Oberts began an application process to enter into a vocational

[5] The medium duty and light duty jobs listed in the August 8, 2002 survey are not SAE, because Mr. Oberts is physically incapable of performing these jobs.

rehabilitation program in October 2002. MX-19, p. 172. He attended a vocational rehabilitation program to become a network control operator from January 15, 2003 through December 10, 2003. TR 119, 128.

Further, a claimant can establish total disability if suitable alternative employment is not reasonably available due to his participation in a Department of Labor (DOL)-sponsored vocational rehabilitation program. See Abbott v. Louisiana Ins. Guaranty Assoc., 27 BRBS 192 (1993), aff'd, 40 F.3d 122 (5th Cir. 1995). In Abbott, the Board held that despite the availability of minimum wage jobs within the claimant's physical capabilities, a total disability award was appropriate because the DOL-sponsored rehabilitation program in which he participated precluded him from working. Id. A total disability award is also appropriate where the claimant participates in a state-sponsored, DOL-approved, vocational rehabilitation program. See Brown v. National Steel and Shipbuilding Co., 34 BRBS 195 (2001). The Board stated, "claimant's approved enrollment in a retraining program committing him to a definitive course of rehabilitation, whether in a state- or federally- sponsored program, satisfies the fundamental policies underlying the Act and its humanitarian purposes." Id. at 198.

The Court finds that the Abbott and Brown rationale applies in this case. Despite MDS's showing of available minimum wage employment, Claimant is entitled to total disability because he was engaged in a state-sponsored vocational rehabilitation program. Ms. Peters of the Illinois Department of Human Services, Office of Rehabilitation Services ("DORS"), testified that Mr. Oberts was referred to her in approximately July 2002, at which point she began working with him to develop a career plan. TR 212. He chose, and Ms. Peters approved, training at CALC to become a network control operator. TR 212-213. Similar to the vocational rehabilitation programs undertaken in Abbott and Brown, Mr. Oberts' program had a definitive course structure and final goal. His completion of the program would afford him an increased earning capacity and the ability to reenter the labor market in a productive role. Mr. Oberts' was a cooperative participant and was consistently progressing towards completion of the program. CX(i)-72. The evidence demonstrates that Claimant's neck pain rendered him incapable of working part-time during his enrollment in the program. Claimant testified, and his CALC records reflect, that his neck pain often precluded him from completing the full class sessions and occasionally caused him to miss whole days. TR 118, 123. As early as February 2003, Mr. Oberts' instructor noted that he was a strong student, but that his back problems were a hindrance to his efforts. CX(i)-72. In December 2003, his neck pain was requiring him to recover in bed after classes, and on December 10, 2003, he ceased attending classes due to debilitating pain.[6] TR 127-128. Claimant's participation in this program clearly precluded him from obtaining SAE, and on the date that Claimant stopped attending the program, Dr. Gornet had already restricted him from all work

[6] Dr. Stabell approved his leave of absence from the program. CX(i)-69, p. 41.

activity.[7] The Court finds that Claimant's participation in the program renders a total disability award appropriate.

Lastly, MDS failed to establish SAE in the April 20, 2004 labor market survey. As of this date, Claimant's physical restrictions had changed such that he was no longer capable of even sedentary work. On September 29, 2003, Dr. Gornet restricted Mr. Oberts from all work until further notice. CX(i)-70, p. 85. Dr. Stabell concurred with the restriction at her deposition, stating that Mr. Oberts currently had too much spasm and pain to do even sedentary work. MX-23, p.37-38.

In conclusion, the Court finds that Claimant has been temporarily totally disabled with respect to his neck from the date he ceased receiving salary from Alsalam on February 7, 2001. At this time, Claimant was unable to fulfill his regular position as crew chief. The responsible employer, MDS, successfully established SAE on August 8, 2002; however Claimant rebutted this showing by demonstrating a willingness to work, conducting a diligent follow-up to the applicable labor market survey, and enrolling in a state-sponsored vocational rehabilitation program. At the time Claimant ceased attending the vocational rehabilitation program, he was restricted from all work, resulting in no SAE.

Claimant has already received total disability payments from Alsalam with respect to his shoulder from February 8, 2001 through July 2, 2001, as per Judge Roketenez's Decision and Order of November 5, 2002. Because a claimant cannot receive compensation greater than 66 2/3 percent of his average weekly wage, the compensation rate for total disability, MDS is responsible for temporary total disability payments beginning July 3, 2001 forward.[8] See Hansen v. Container Stevedoring Co., 31 BRBS 155 (1997).

AVERAGE WEEKLY WAGE

Section 10 of the Act, 33 U.S.C. § 10, sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52 pursuant to Section 10(d) in order to arrive at an average weekly wage. See Johnson v. Newport News Shipbuilding and Dry Dock Co., 25 BRBS 340 (1992). The determination of an

[7] Dr. Gornet restricted Mr. Oberts from all work until further notice on September 29, 2003, which is prior to the date Mr. Oberts stopped attending the program, December 10, 2003 . See CX(i)-70, p. 85.

[8] The Court clarifies that Claimant and Alsalam's dispute regarding the post-July 2, 2001 nature and extent of his shoulder injury is irrelevant because Claimant cannot receive greater than total disability compensation. This Court has awarded Claimant total disability compensation with respect to his neck injury, an injury prior to the shoulder injury, exhausting Claimant's allowable compensation. See Hansen v. Container Stevedoring Co., 31 BRBS 155 (1997).

employee's annual earnings must be based on substantial evidence. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991).

Section 10(a) applies when an employee has worked in similar employment for substantially the whole of the year. See 33 U.S.C. § 910(a). The inquiry focuses on whether the employment was intermittent or permanent. Gilliam v. Addison Crane Co., 21 BRBS 91 (1987); Eleazer v. General Dynamics Corp., 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady, then §10(a) will apply. See Duncan v. Washington Metro. Area Transit and Auth., 24 BRBS 133, 136 (1990). The §10(a) formula requires the finding of an average daily wage and can only be utilized if the record contains evidence from which an average daily wage can be determined. Taylor v. Smith & Kelly Co., 14 BRBS 489, 494-95 (1981); Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 1179, 5 BRBS 23, 26 (9th Cir. 1976).

The Court finds that § 10(a) cannot reasonably and fairly be applied to yield an average weekly wage that reflects Claimant's annual earning capacity at the time of his injury. Claimant did not work in similar employment for substantially the whole of the year prior to the October 28, 1997 bus accident. Claimant's employment status changed when he agreed to accept a technician airplane crew chief position in Saudi Arabia, which commenced on July 6, 1997, sixteen weeks prior to his injury. CX(i)-2. Sixteen weeks is not substantially the whole of a year,[9] and, consequently, the Court finds that § 10(a) is inapplicable to this case.

Because Section 10(a) is not applicable, the Court will look to § 10(b). Section 10(b) calculates the average weekly wage based on similarly situated employees and applies when the injured employee did not work for substantially the whole of the year under § 10(a). See 33 U.S.C. § 910(b). Because no evidence was presented concerning the wages of a similarly situated employee, the Court finds that § 10(b) is also inapplicable to this case.

When both Sections 10(a) and (b) are inapplicable, the calculation of average weekly wage defaults to § 10(c), which allows the Court to calculate a claimant's average weekly wage in a manner that reflects a fair and reasonable approximation of the claimant's annual wage earning capacity at the time of his work injury. See 33 U.S.C. § 910(c). In determining earning capacity under § 10(c), "the administrative law judge must make a fair and accurate assessment of the injured employee's earning capacity, the amount that the employee would have the potential and opportunity of earning absent the injury." Empire United Stevedores v. Gatlin, 936 F.2d 819, 823, 25 BRBS 26, 29 (CRT) (5th Cir. 1991). The claimant's actual earnings at the time of injury does not control the administrative law judge's average weekly wage calculation under § 10(c), although they

[9] Twenty-eight weeks of employment constitute substantially the whole of the year for purposes of §910(a). Anderson v. Todd Shipyards, 13 BRBS 593, 596 (1981).

are factors to be considered. Id. An administrative law judge has significant discretion in determining the appropriate average wage, but must base the wage determination on adequate evidence in the record. See Staftex Staffing v. Director, OWCP, 237 F.3d 404, 406, 34 BRBS 44, 45 (CRT) (5th Cir. 2000); Taylor v. Smith & Kelly Co., 14 BRBS 489 (1981).

As discussed above, the Court declines to use Claimant's actual earnings in the year preceding his injury because they are not representative of his change in employment status shortly prior to the injury. Claimant's acceptance of an overseas position in Saudi Arabia, which compensated him with increased wages and incentives, indicates that he had a new potential earning capacity he would have achieved absent the injury. Therefore, the Court will calculate Claimant's annual wage earning capacity on the basis of the employment contract entered into between Claimant and MDS, as well as other evidence of record. See CX(i)-2.

Claimant's employment contract included a basic monthly salary of $2,448.33, or $29,379.96 per year. CX(i)-2. The contract also included a Foreign Service Additive of 20 percent of the basic monthly salary, $489.67 per month or $5,876.04 per year, and a cost of living differential of 10 percent of the basic monthly salary, $244.83 per month or $2,937.96 per year. Claimant was to receive a completion award of $3,000 at the conclusion of his first year of service. The contract specified a $6300 incentive leave, comparable to earned vacation time, at the completion of six months of service. Lastly, the contract provided for home leave at the completion of one year of service, to be paid as a lump sum payment equivalent to the cost of full fare round trip tickets to Claimant's home of record for him and his dependents, payable regardless of whether the family chose to travel or not. CX(i)-2.

Claimant and MDS dispute the inclusion of several advantages bestowed by the employer under the contract in the calculation of Claimant's wages. Under § 902(13), "wages" are defined as the money rate at which the employee is compensated under the contract of hire in force at the time of the injury, including the reasonable value of any advantage received from the employer and included for purposes of withholding under the Internal Revenue Code. 33 U.S.C. § 902(13). The definition also specifically excludes fringe benefits, such as employer contributions to retirement, health and welfare, life insurance, and social security. The Board has specified that easily ascertainable advantages paid by the employer, which are included for purposes of tax withholding and are not fringe benefits, are considered wages under the Act. Denton v. Northrop Corp., 21 BRBS 37 (1988) (including overseas allowance, incentive compensation, completion award, foreign housing allowance, and cost of living adjustment in the calculation of wages).

The Court finds that the Foreign Service Additive, cost of living differential, completion award, incentive leave, and home leave shall be included in the calculation of

Claimant's wages. The Foreign Service Additive and cost of living differential are ascertainable advantages, which the Board has conclusively found to be "wages." See Denton, 21 BRBS at 48. Similarly, the completion award is an ascertainable advantage included in the contract for hire; it is a fixed amount and contingent only upon the completion of one year of service. The incentive leave is comparable to earned vacation time, and it is well-established that holiday and vacation pay are included in wage computations. See Duncan v. Metropolitan Washington Area Transit Authority, 24 BRBS 133 (1990). The home leave was listed in the employment contract as a foreign allowance and was to be received regardless of whether Claimant actually used the award towards airfare to travel home. TR 70. It is ascertainable in that the contract specified it was to be a lump sum payment equivalent to the cost of round trip airline tickets for Claimant and his dependents from Saudi Arabia to his home of record. The amount Claimant received in 1998 was $16,752, as reported on his 1998 income tax return. The Court finds that $16,752 is, therefore, a fair and reasonable value to represent the home leave included as an advantage in Claimant's contract for hire. MX-59, p. 58.

The Court finds the following calculation to be a fair and reasonable approximation of the claimant's annual wage earning capacity at the time of his work injury, under § 10(c): $29,379.96 (base salary) + $5,876.04 (foreign service additive) + $2,937.96 (cost of living differential) + $3,000 (completion award) + $6,300 (incentive leave) + $16,752 (home leave) = $64,245.96 (annual wages).

Dividing $64,245.96 by 52 weeks, pursuant to § 10(d), yields an average weekly wage of $1,235.50. The Court finds that this figure fairly represents a calculation of Mr. Oberts' average weekly wage at the time of his work injury and is acceptable under § 10(c), a section under which the Court has wide discretion. Pursuant to §906(b)(1), however, Claimant's compensation may not exceed 200 percent of the applicable national average weekly wage. On October 28, 1997 the maximum average weekly wage was $835.74. United States Dept. of Labor, Employment Standards Administration (December 30, 2004). Therefore, Claimant is entitled to this maximum, and its yearly increases, rather than the average weekly wage calculated by the Court under § 10(c).

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) the employer shall furnish such medical, surgical, and other attendance or treatment, nurse or hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-58 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); see also Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980). An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; see also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curiam), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983).

Claimant seeks reimbursement for Dr. Stabell's care amounting to $954.45, pain relief medications prescribed by Dr. Stabell amounting to $3,702.35, and an EMG/NCV ordered by Dr. Stabell totaling $446.49. Claimant also seeks an order for MDS to pay for the necessary surgery to correct the failed fusion. Dr. Stabell was not an authorized treating physician, as Claimant testified that he sought Dr. Stabell of his own accord to care for his pain control. TR 103. Therefore, all medical bills resulting from Claimant's consultations with Dr. Stabell are not reimbursable because Claimant did not request authorization from Employer prior to obtaining the treatment. Employer had no opportunity to refuse or approve this treatment. However, based upon the opinions of Dr. Gornet and Dr. Stabell, Claimant's treating physicians, the Court finds that a fusion revision surgery is necessary and hereby orders MDS to pay for such surgery. The Court further finds that MDS is responsible for all future reasonable medical expenses necessary to care for Claimant's cervical spine condition.

SECTION 8(F) SPECIAL FUND RELIEF

Section 8(f) shifts part of the liability to pay compensation for permanent disability or death from an employer to the Special Fund established in § 44 of the Act when the disability or death is not due solely to the injury that is the subject of the claim. See Wiggins v. Newport News Shipbuilding & Dry Dock Co., 31 BRBS 142, 146 (1997); 33 U.S.C. § 908 (f) and § 944. To be entitled to compensation under § 8(f) when the employee is permanently totally disabled, the employer must establish that the employee seeking compensation had: (1) an "existing permanent partial disability" before the employment injury; (2) that the permanent partial disability was "manifest" to the employer; and (3) that the current disability is not due solely to the employment injury.

Two "R" Drilling Co. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34, 35 (CRT) (5th Cir. 1990); Director, OWCP v. Campbell Industries Inc., 14 BRBS 974, 976 (9th Cir. 1982), cert. denied, 459 U.S. 1104, 113 S.Ct. 726, 74 L.Ed. 2d 951 (1983); 33 U.S.C. § 908(f)(1).

The Court finds that Section 8(f) relief is not available to MDS in this case because Claimant's disability is temporary, rather than permanent. Permanency of the disability is requisite to obtaining relief from the Special Fund, and the Regional Solicitor's approval of Section 8(f) relief was conditioned upon a finding of permanency.

ATTORNEY'S FEES

Under Section 28(b) of the Act, when an employer voluntarily pays benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid by the employer. See 33 U.S.C. § 928(b); Moody v. Ingalls Shipbuilding, Inc., 27 BRBS 173, 176 (1993). Under Section 28(b) of the Act, when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid or tendered by employer. See 33 U.S.C. § 928(b); Moody, 27 BRBS at 176. In awarding a fee, the administrative law judge must take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 20 C.F.R. § 702.132; Muscella v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 272 (1980).

MDS has paid Claimant compensation benefits from July 3, 2001 through May 4, 2004, a total of 147 weeks, at varying rates totaling $57, 399.42. See JX-1. On average, MDS was paying Claimant $390.47 per week,[10] which is significantly less than this Court's award of $557.15 per week.[11] In this case, Claimant has succeeded in obtaining greater compensation than that paid by MDS. Therefore, the Court finds that MDS is liable for Claimant's attorney fees.

Accordingly,

[10] $57,399.42 divided by 147 weeks equals $390.47 per week.

[11] $557.15 per week is the equivalent of 66 2/3 percent of Claimant's $835.74 average weekly wage.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

1) MDS is the responsible employer for Claimant's 1997 employment-related neck injury.

2) MDS shall pay to Claimant compensation for temporary total disability from July 3, 2001 and continuing, based on the maximum national average weekly wage.

3) MDS shall be entitled to a credit for all payments of compensation previously made to Claimant.

4) MDS shall pay to Claimant interest on any unpaid compensation benefits. The rate shall be calculated as of the date of this Order at the rate provided by 28 U.S.C. Section 1961.

5) MDS shall pay Claimant for all reasonable and necessary future medical expenses that are the result of Claimant's 1997 employment-related neck injury, including the corrective fusion surgery recommended by Dr. Gornet.

6) Claimant's counsel shall have thirty (30) days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

7) All calculations necessary for the payment of this award are to be made by the OWCP District Director.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge

RDM:bbd